IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 23

FIRST NATIONAL BANK OF ARIZONA, as successor executor of the last will and testament of GERALD B. WALDRON, Deceased,

Petitioner,

v.

CITIES SERVICE CO.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR REHEARING

Petitioner prays that this Court grant rehearing of its decision of May 20, 1968, which affirmed the entry of summary judgment in favor of respondent.

Reasons for Granting Rehearing

Petitioner respectfully directs the Court's attention to a substantial error in the Court's review of the record which caused the Court, as a matter of appellate procedure, to refuse to consider evidence of conspiracy creating a genuine issue of fact; to the fact that the Court's ruling represents a significant departure from its earlier summary judgment decisions; and to the Court's failure to consider petitioner's unsuccessful attempts to obtain Rule 26 discovery before Cities moved for summary judgment.

I.

The Court was mistaken in its belief that petitioner had not asserted below the theory that Cities was threatened into joining the conspiracy.

In footnote 16, pages 22-23, of the Court's opinion, the Court rejected petitioner's argument that an issue of fact exists as to whether Cities' participation in the conspiracy was obtained by threats of retaliation from the other defendants. The Court stated: "One searches in vain among petitioner's papers prior to argument in this Court for a single intelligible statement of this theory." As a consequence of this ruling, the Court refused to consider the compelling inference of conspiracy raised by the facts that W. Alton Jones was threatened with loss of Cities' needed oil supplies by the "Big Boys" at the American Petroleum Institute convention in November 1952 unless Cities declined to deal in Iranian oil; that Jones and Cities then declined to deal in Iranian oil and took a position in support of the Cartel members; and that Cities a month later entered a contract to purchase Kuwait oil from Gulf.

The Court was mistaken when it said that petitioner failed to make the argument to the lower courts that Cities was coerced into the conspiracy by threats from the other defendants. The theory and the facts in support of it were urged repeatedly upon the lower courts in briefs submitted by petitioner. Those briefs, containing only argument, were not included in the record before this Court since petitioner had no reason to suspect that the Court would doubt that the point was properly raised. Respondent never questioned it, not even before this Court. Indeed, not only did petitioner point out the significance of the threat made to Cities at the A.P.I con-

vention, but he also drew the attention of the district court to numerous other threats made against Cities when its interest in Iran was revealed.

The principal facts upon which the argument concerning threats is based, i.e., the public announcement by Anglo-Iranian that it would take action against any company which dealt in Iranian oil and the admission by an officer of Cities that Cities had been threatened with a boycott if it dealt in Iranian oil, were revealed in petitioner's deposition testimony before Cities moved for summary judgment. In petitioner's very first brief opposing summary judgment on May 6, 1960, he set forth the facts concerning the threats against Cities in language nearly identical to that used in his main brief to this Court:

> "Not long afterwards, Whetzel [sic] of Cities Service called plaintiff on the telephone and, in the course of the discussion, related that a medal had been prepared for Jones, to be presented to him at the American Petroleum Institute's annual convention in Chicago, but that because of Jones' trip to Iran the medal was not going to be given him. He said Jones was mad as a hornet and was going to talk to Mr. Eisenhower about it. Whetzel continued, 'The Big Boys called Mr. Jones in and told him that they hoped he got his Iranian oil. That they hoped he got all he wanted out and quickly because he wasn't going to get any more oil from them'. He concluded, 'You know, that could be disastrous' [Tr. 6337]." (Page 11).

At the oral argument of May 27, 1963, Judge Herlands attempted to summarize petitioner's position as being that:

> ". . . under the circumstances there is no other alternative but to assume that there was a conspiracy and that Cities Service was bought off in some way or other.

"Mr. Beshar [petitioner's counsel]: Bought off or frightened off. In any case, that they joined the conspiracy.

"The Court: All right." (R. 11834).

At the same argument, Judge Herlands asked petitioner's attorney to specify and itemize the pieces of evidence and other information which supported petitioner's request for further discovery or which established a genuine issue for trial (Oral Argument of May 27, 1963, R. 11837-39). On August 16, 1963, petitioner submitted a Memorandum of Facts, in response to Judge Herlands' request. The threats against Cities were heavily emphasized to support the inference that Cities had been coerced into the conspiracy.

At the beginning of the Memorandum of Facts, petitioner listed as the first "genuine issue" requiring discovery the following:

> "I. Did defendant Cities Service give up its ambition to take over the Iranian oil installations under a management contract for which it would receive payment in crude oil because of threats or inducements by the other defendants and their co-conspirators?" (Page 9).

In support of his contention that whether Cities was threatened into joining the conspiracy raised an issue of fact, petitioner, in the same Memorandum, brought to Judge Herlands' attention the following:

> "Once again the British foreign office reiterated its threat that 'all possible steps will be taken against W. Alton Jones, American oil executives, and any other oil operators if they buy "stolen oil from Iran"' (Herald-Tribune, September 30, 1952 'Britain Warns U. S. of Action if Jones Buys "Stolen" Iran Oil'" (Page 33).

* * * * *

"In due times Jones came home to face a hostile oil industry. Plaintiff does not know whether Jones gave up his intention to seek a management contract from the Iranians before he came home or whether he was threatened or induced to do so after his return. The latter seems more likely in view of his statements to the press, *infra*. But one thing is clear: When he did get home, Jones caught hell from those called the Big Boys. A year before Jones had been Chairman of the Board of the influential American Petroleum Institute. The A.P.I. had, it is reported, voted to award Jones its highly prized annual gold medal as the outstanding oil man of the year. To Jones' intense anger and chagrin, the medal, supposedly already struck, was melted down and never presented to Jones because of the majors' resentment of his role in Iran.

"There were explicit threats as well. Whetsel, Head of Foreign Operations for Cities Service and one of the top executives who accompanied Mr. Jones to Iran, called Waldron after the third trip and reported:

> "'He [Whetsel] said the big boys had called Mr. Jones in and that they wished him well on his Iranian venture and hoped that he got all, all the oil he wanted soon, because he wasn't going to get any more oil from them' (Tr. 5655)." (Pages 36-37).

In his final brief submitted to Judge Herlands, petitioner put the issue as follows:

> "Further evidence of a conspiracy is Waldron's testimony that Whetsel, a Cities' officer, informed him that the 'Big Boys' threatened to withdraw Cities' source of supply of oil at the A.P.I. convention in November 1952 (6337). This testimony has never been contradicted by Cities." (Supplemental Memorandum, filed February 9, 1965, Page 7).

Petitioner maintained his position in the court of appeals, arguing that the threatened withdrawal of its supplies furnished good reason for Cities to join the conspiracy:

> "Plaintiff has shown that Jones spent five days on his way to Iran visiting Sandberg, a representative of one of the co-conspirators, and two days during his stay there to talk with representatives of A.I.O.C. and Gulf, two other co-conspirators. Thus, Cities had an opportunity to join the conspiracy. Cities was threatened with the withdrawal of future supplies of oil at a time when it was negotiating for a large purchase of oil from Gulf to help relieve its chronic shortage of crude oil. Thus, there was good reason for it to join in the conspiracy. Finally, Cities secretly interfered with Waldron's attempt to sell oil under his contract to the United States Government in the hope of breaking the blockade on Iranian oil, told Waldron that it was not interested in Iranian oil and rejected his offer to supply tankers. Thus, Cities took up the cause of the co-conspirators. From this evidence, which demonstrates opportunity, motive, and a course of conduct injurious to plaintiff, a rational inference may be drawn that Cities' otherwise unexplained failure to proceed with its proposal to assist Iran and improve its own position was the result of having agreed with the co-conspirators that it would refuse to deal with the Iranians or anyone who attempted to sell their oil. On this motion for summary judgment, this inference must be drawn." (Plaintiff-Appellant's Br., Point I, pages 40-41).

The threat of a boycott of Cities' supplies, admitted by Whetsel, an officer of Cities, along with the many other threats which were directed at Cities once its interest in

Iranian oil became known to the other defendants, provides the element of motive for Cities' decision to walk away from Iran.

The Court's action in eliminating the fact of petitioner's repeated statements of the threats and the theory of conspiracy by threat appears to petitioner to have had a crucial effect on the Court's consideration of the case:

> (a) Only by taking the position that such statements and theory were not presented to the lower courts could the Court say that "In these circumstances we cannot attribute error to the courts below for their failure to discern such a theory . . . ." (Opinion, p. 23, n. 16).
>
> (b) Only because it was unaware of the contents of the briefs below could the Court say that there is not "a single intelligible statement of this theory." (*Ibid.*).
>
> (c) Only by refusing to consider the fact of the threats and the theory of conspiracy by threat can the Court say that ". . . more extended discovery under Rule 56(f) of Cities' activities subsequent to its refusal to deal with him would have been proper" but for petitioner's failure to introduce ". . . some significant evidence that Cities had become a member of the conspiracy. . . ." (Opinion, p. 40).
>
> (d) Only by eliminating the threats and the theory of conspiracy by threat from petitioner's case could the Court conclude that the inference that Cities' failure to deal was the product of factors other than conspiracy is "more probable" (Opinion, p. 23) than the inference of conspiracy.

From the very outset of Cities' motion, petitioner directed the attention of the courts below to the threats made against Cities and argued that from those facts together with the sequence of events which surrounded them an

inference could be drawn that Cities had been coerced into joining the conspiracy. Petitioner respectfully submits that the Court was mistaken in refusing to consider these crucial facts.

II.

The Court has departed from its earlier summary judgment decisions by weighing several permissible inferences and then adopting one of them.

Heretofore, this Court has adhered to the principle that "On summary judgment the inferences to be drawn from the underlying facts contained in [the affidavits, attached exhibits, and depositions submitted below] must be viewed in the light most favorable to the party opposing the motion." *United States* v. *Diebold, Inc.*, 369 U. S. 654, 655 (1962).

Rather than viewing the underlying facts presented by the record in the manner most favorable to petitioner, the Court elected to weigh the conflicting inferences and affirm the award of summary judgment because, in the Court's view, the inference of non-conspiracy was "more probable" than the inference of conspiracy. At pages 22-23 of its opinion, the Court stated:

> "Therefore, not only is the inference that Cities' failure to deal was the product of factors other than conspiracy at least equal to the inference that it was due to conspiracy, thus negating the probative force of the evidence showing such a failure, but the former inference is more probable."

The Court made similar appraisals of the facts elsewhere in its decision. At page 21, it stated:

> "It is thus clear that the evidence furnished by petitioner himself provides a much more compelling

> explanation for Cities' failure to purchase Iranian oil than does his argument that such failure is evidence of conspiratorial behavior by Cities."

And at page 26:

> "As for the probative value of the failure to deal with Waldron, the same objection is applicable to the proposed transaction with Richfield that has been discussed in connection with the proposed deal with Cities, namely, the probability that it was due to a desire to avoid difficulties that would be presented by Anglo-Iranian and the other defendants. Moreover, since petitioner's contract had expired by the time the deal fell through it is also possible that no agreement was reached because Waldron no longer had anything to offer. Therefore, the failure of petitioner to sell oil to Richfield adds nothing to his case against Cities."

And at page 27:

> "Under those circumstances, what petitioner characterizes as vindictive interference by Jones appears far more likely to have been a desire not to be used in someone else's financial dealings."

The trial judge in *United States* v. *Diebold, Inc., supra,* also followed the inference which to him appeared "more probable." Nevertheless, this Court unanimously reversed his decision because, viewing the facts in the light most favorable to the party opposing summary judgment, inferences contrary to those drawn by the trial court "might be permissible." 369 U. S. at 655. The inference that Cities joined the conspiracy alleged in the case at bar is not merely "permissible," but, particularly when Cities' action is viewed in the light of the threats made against it by the other defendants, the inference of conspiracy is quite probable.

Only by taking up the role of the jury and weighing the conflicting inferences which are permissible from the record could the Court conclude that there is no genuine issue as to whether Cities joined the conspiracy. Such a weighing of the evidence is inconsistent with the Court's earlier pronouncements concerning the role to be played by a court in deciding a motion for summary judgment. Previously, the choice of inferences has been reserved for the jury. *Poller* v. *Columbia Broadcasting System, Inc.*, 368 U. S. 464, 473 (1962); *Sartor* v. *Arkansas Gas Corp.*, 321 U. S. 620, 628 (1944), quoting from *Aetna Life Ins. Co.* v. *Ward*, 140 U. S. 76, 78 (1891). See also, 6 Moore, Federal Practice §56.23, at 2856 (2d ed. 1966).

III.

The Court overlooked the district court's denials of petitioner's attempts to obtain Rule 26 discovery before Cities moved for summary judgment.

Finally, the Court was mistaken when, after equating Rule 56(f) discovery with limited discovery, it said:

> "Petitioner conceded below that his discovery should proceed under Rule 56(f) rather than Rule 26." (Opinion, p. 41, n. 23).

Petitioner never conceded that he was not entitled to full Rule 26 discovery. He claimed that right in the district court, but it was denied to him in an order not subject to immediate review (R. 11051-56). Thereafter, he contended for the same broad discovery under Rule 56(f) when Cities made its motion for summary judgment (Tr. Vol. III, 81, 118). Again, he was denied his right (Tr. Vol. I, 69a).

On appeal in this Court, petitioner asserted as a separate error the district court's refusal in its 1958 order to lift the stay on his discovery imposed, over petitioner's objections, in 1956 (Petitioner's Br., p. 46). When Cities made its motion for summary judgment in 1960, petitioner was in the unique position of a plaintiff of four years' standing without any discovery, general or limited. Petitioner asserts that, before his case was put to the test of summary judgment, he should have been allowed the full sweep of discovery accorded as a matter of right to all federal litigants. To the extent that he had been unable to get that discovery under Rule 26 before the summary judgment motion, fairness required that the court grant him full discovery under Rule 56(f) after the motion on the issue raised by the motion. That issue, as the Court realized (Opinion, p. 31), was the existence of a conspiracy.

Under the Court's decision as it now stands, Rule 56 may be utilized by any defendant as a means of unjustly preventing the plaintiff from exercising his right to full discovery. All he has to do is to make a summary judgment motion at the outset of the case or, as in the case at bar, prevail upon the court to stay plaintiff's discovery while the plaintiff is examined at length and then move for summary judgment before plaintiff has an opportunity to conduct any general discovery on his own behalf. If the plaintiff then moves for discovery under Rule 56(f), as he must, his motion under that rule can be used as a concession that he is not entitled to full disclosure. This, we submit, was not the intention of the draftsmen of Rule 56.

When petitioner's counsel asked for discovery under Rule 56(f) in 1960, he was constrained to do so by the 1958 order which continued the 1956 stay of his discovery. The scope of the discovery for which he asked at every opportunity was the full discovery to which he was entitled under Rule 26. It should have been accorded to him.

CONCLUSION

For the reasons set forth above and in petitioner's main briefs, it is respectfully urged that rehearing be granted and that upon such rehearing, the judgment below be reversed.

Respectfully submitted,

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Certificate of Counsel

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

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